Prior Inconsistent Statements: Congress Takes a Compromising Step Backward in Enacting Rule 801(d)(1)(A)

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Recommended Citation
Prior Inconsistent Statements: Congress Takes a Compromising Step Backward in Enacting Rule 801(d)(1)(A)

JOHN M. STALMACK*

INTRODUCTION

Prior inconsistent statements made out of court by a presently testifying witness have traditionally been considered hearsay and, thus, inadmissible as substantive evidence. In attempting to liberalize this and other restrictive rules which keep evidence from the triers of fact, Congress enacted the Federal Rules of Evidence, signed into law by President Ford on January 2, 1975. However, the final form of rule 801(d)(1)(A) is not at all consistent with the general tenor of liberalization. It represents, in essence, a compromising step backward from the enactment of a more efficient rule


The author gratefully acknowledges the research and editorial assistance of Ms. Patsy J. Bednarski of the Loyola University of Chicago Law Journal.

Much of the original research included in this article was submitted in partial satisfaction of the requirements for the degree of Master of Laws at the George Washington University National Law Center. Appreciation is gratefully expressed to Professor David Robinson, Jr., of the National Law Center Faculty.

1. Hearsay is defined in Fed. R. Evid. 801(c) as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." This is essentially the definition followed by most of the scholars and courts. See United States v. Snow, 517 F.2d 441, 443 (9th Cir. 1975); C. McCormick, EVIDENCE § 246, at 584 (2d ed. 1972). A statement is not hearsay, of course, when the issue is whether the statement had been made. United States v. John, 508 F.2d 1134, 1143 (8th Cir. 1975); C. McCormick, EVIDENCE § 249, at 588-89 (2d ed. 1972). Some scholars have taken the position that a witness' prior inconsistent statement is hearsay, but should be excepted from the hearsay rule. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 192-96 (1948) [hereinafter cited as Morgan]. McCormick, The Turncoat Witness: Previous Statements as Substantive Evidence, 25 TEXAS L. REV. 573, 576 (1947) [hereinafter cited as McCormick]. Other scholars maintain the position that the prior inconsistent statement of a presently testifying witness should not be considered as hearsay because, since the witness is presently under oath and subject to cross-examination, the purpose of the hearsay rule has been satisfied. S. Ladd & R. Carlson, CASES AND MATERIALS ON EVIDENCE 210 (1972); 3A J. Wigmore, EVIDENCE § 1018 (Chadbourn rev. 1970); 3 J. Wigmore, EVIDENCE § 1018 (3d ed. 1940); 2 J. Wigmore, EVIDENCE § 1018 (2d ed. 1923); Maguire, The Hearsay System: Around and Through the Thicket, 14 VAND. L. REV. 741, 767-68 (1961) [hereinafter cited as Maguire].

801(d)(1)(A) which would unqualifiedly admit as substantive evidence any prior inconsistent statement of a presently testifying witness.

By examining traditional views, and by contrasting those views with more liberal ideas propounded by scholars and drafters of model legislation, this article will demonstrate that the trepidation of many regarding admission of prior inconsistent statements is groundless. Critical analysis of the internal inconsistency of rule 801(d)(1) and of the interdependence of rule 801(d)(1)(A) and rule 607 of the Federal Rules of Evidence will further demonstrate that the present form of rule 801(d)(1)(A) spawns unnecessary confusion in courtrooms and leads to the emasculation of what could have been an innovative undertaking to present truth to the triers of fact.

THE CONGRESSIONAL COMPROMISE

Rule 801(d)(1)(A) is the product of many years of careful consideration by both the Judicial Conference of the United States and the Congress. In its present form, rule 801(d)(1)(A) of the Federal Rules of Evidence states:

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or . . . .

The Judicial Conference, through its Advisory Committee, proposed three different versions of the Federal Rules of Evidence. The latest version, commonly referred to as the Supreme Court's version, proposed in 1972, contained a rule 801(d)(1)(A) that read as follows:

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and . . . .

Congress postponed enactment on March 30, 1973.\footnote{Act of March 5, 1973, Pub. L. No. 93-12, reprinted in [1973] U.S. Code Cong. & Ad. News 11. The rules would have gone into effect on July 1, 1973.} Hearings were held in both the House\footnote{Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 2 (1973) [hereinafter cited as 1973 Hearings].} and Senate.\footnote{Hearings on H. R. 5463 Before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974) [hereinafter cited as 1974 Hearings].} The House Subcommittee on Criminal Justice of the Committee on the Judiciary proposed a rule that was essentially the same as existing rule 801(d)(1)(A). The Subcommittee’s rule said:

\begin{quote}
(d) \textit{Statements which are not hearsay.} — A statement is not hearsay if—

(1) \textit{Prior statement by witness.} — A declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath and subject to the penalty of perjury at a trial, or hearing or in a deposition or before a grand jury, or . . .\footnote{1973 Hearings, supra note 7, at 382-83 (Supp.); see id. at 170-71.}
\end{quote}

The full Committee, disagreeing with its Subcommittee’s proposal, added a requirement that the prior inconsistent statement must have been made by the witness while subject to cross-examination.\footnote{H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 13 (1973). The effect of the committee’s additional requirement was to eliminate admissibility of grand jury testimony.}

Despite two attempts on the House floor to amend rule 801(d)(1)(A), the Committee’s version of the rule passed on February 6, 1974.\footnote{120 Cong. Rec. H560-63, 70 (daily ed. Feb. 6, 1974). An amendment by Congressman Mayne (R. Iowa) would have returned the Committee’s version of rule 801(d)(1)(A) to the Subcommittee’s version. An amendment by Congressman Hogan (R. Md.) would have made the House version of rule 801(d)(1)(A) identical to the Supreme Court version of that rule.} The House gave three reasons in justification of its position.\footnote{H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 13 (1973).}

1. First, its version of rule 801, although restricting in rule 801(d)(1)(A) the type of prior inconsistent statement admissible as substantive evidence, included no such restrictions in rule 801(d)(1)(C). Therefore, the liberality of admitting the identification of a person made after he was perceived was unaffected. Second, by requiring the prior inconsistent statement of a currently testifying witness to have been made when that witness was at a formal proceeding and under oath, the rule eliminated dispute as to whether the statement actually had been made. Finally, the requirement that there must have been an opportunity for cross-examination at the formal proceeding provided additional assur-
ances of the statement’s reliability. Thus, the House believed that its version not only would insure reliability of the prior inconsistent statement, but also would be consonant with the policy of the Supreme Court’s version to counteract the effect of witness intimidation in criminal cases.\(^\text{13}\)

The Senate, on the other hand, proposed a version of rule 801(d)(1)(A) that was identical to the Supreme Court’s version.\(^\text{14}\) The Senate took the position that the House version’s requirements of prior oath and cross-examination were unnecessary. The Senate believed that it sufficed for the witness to be presently under oath and subject to cross-examination, thus providing an adequate opportunity to explain any earlier statements. The Senate remonstrated that of the many recognized exceptions to the hearsay rule, only one, the former testimony exception, required the out of court statement to have been made while its declarant was under oath. Moreover, the Senate indicated that the demeanor of a presently testifying witness was enough to enable the jury to make a determination of belief in the witness’ prior statement. The Senate also stressed the affirmative advantages of its rule 801(d)(1)(A). Because the witness had made the prior inconsistent statement closer to the events in issue, his memory would be fresher, and he would not be subject to intervening influences. Furthermore, the Senate believed that its version provided the only realistic method for coping with the turncoat witness.\(^\text{15}\)

In conference, a compromise was reached whereby the Senate’s version was adopted with an amendment designed to insure sufficient reliability of prior inconsistent statements.\(^\text{16}\) It is this amendment which constituted a backward step. It rejected the spirit of total liberality of the Senate/Supreme Court version by requiring that the prior inconsistent statement be “given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.”

Fortunately, the wording “other proceeding” covers statements made before a grand jury,\(^\text{17}\) and has been read by at least one court to include sworn statements made in such proceedings as interrogations by immigration officials.\(^\text{18}\) Hence, some increased liberalizat-

\(^{13}\) Id.


\(^{15}\) Id.

\(^{16}\) CONF. REP. No. 93-1597, 93d Cong., 2d Sess. 10 (1974).

\(^{17}\) Id.

\(^{18}\) United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976). The words “or other proceeding” might lead one to suspect that a mere affidavit would suffice to satisfy the
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To appreciate the merit of the minority position, exemplified by the Supreme Court version of rule 801(d)(1)(A), which would admit out of court prior inconsistent statements of a presently testifying witness as substantive evidence, one must examine the position of the majority of jurisdictions which adopt the orthodox view that prior inconsistent statements are hearsay and thus inadmissible except for the limited purpose of impeaching the witness' credibility. Three reasons for precluding the use of hearsay have usually been propounded. First, the out of court declarant made the statement when he was not under oath. Second, he did not make the statement at a time when his demeanor could be observed by the triers of fact. Third, he made the statement when he was not subject to cross-examination.

The orthodox position can best be exemplified by the opinion of Judge Stone in the Minnesota Supreme Court case of State v. Saporen. In Saporen, the defendant was convicted of carnal knowledge and abusing a female child under the age of eighteen. At trial, the prosecution called a Mr. B. J. Sekerman who testified inconsistently with an unsworn, out of court statement that he gave to a probation officer who was assisted by a stenographer. The prosecution requirements of the rule; that suspicion, however, is probably incorrect. 4 J. Weinstein & D. Berger, Weinstein's Evidence § 801(d)(1)(A), at 801-70 (1975).


22. 205 Minn. 358, 285 N.W. 898 (1939); see Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). See also United States v. Rainwater, 283 F.2d 386 (8th Cir. 1960).
tor thereafter successfully introduced Mr. Sekerman's prior inconsistent statement as substantive evidence. Mr. Sekerman, although admitting that he made the prior statement, also asserted that he was forced into giving that statement by threats that he would receive seven years in the reformatory unless he testified adversely to the defendant.  

In his opinion, Judge Stone reversed the trial court's allowance of Mr. Sekerman's prior inconsistent statement as substantive evidence because that statement was not given under oath and because it was not subjected to immediate cross-examination. Judge Stone had two objections to giving substantive effect to a witness' out of court inconsistent statement that was made while the witness was not under oath. First of all, the prior statement's lack of oath also carried with it a lack of solemnity. Secondly, since Mr. Sekerman's prior inconsistent statement was not made while he was under oath, he could not be prosecuted for perjury.  

Judge Stone considered crucial the fact that Mr. Sekerman's statement had been made at a time when he was not subject to immediate cross-examination:

> The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.

The three reasons propounded by the majority have been rebutted directly by drafters of model legislation, proponents of unqualifiedly giving substantive effect to prior consistent statements as well as to prior inconsistent statements. Illustrative is the American Law Institute's Model Code of Evidence, proposed in 1942:

> Rule 503. Admissibility of Evidence of Hearsay Declaration. Evidence of a hearsay declaration is admissible if the judge finds that the declarant
> (a) is unavailable as a witness, or
> (b) is present and subject to cross-examination.

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23. See text accompanying notes 59-64 infra.
24. See text accompanying notes 29-33 infra.
25. 285 N.W. at 901. Professor Morgan attacked Judge Stone's allegation that the witness' prior inconsistent statement was the statement most likely to be false. Professor Morgan to the contrary believed that the witness' prior statement was the statement most likely to be true because the witness had no opportunity either for reconsideration or for baneful influence by others. Morgan, supra note 1, at 193.
In its commentary to rule 503, the American Law Institute made its argument for the liberal admissibility of a witness’ prior statement. The touchstone of its argument was that the declarant of the prior statement is presently in court, under oath, and subject to the adversary’s cross-examination. If the declarant alleges to recall the relevant matter, the adversary is fully protected, and the jury is in a favorable position to weigh the declarant’s out of court statement in relation to his present testimony. If the declarant purports to have no recollection of the relevant matter, the need for the evidence is just as great as if the declarant were unavailable. In either situation, the drafters of the Model Code of Evidence believed, both the adversary and the jury would be in an advantageous position to evaluate the evidence because the witness who made the prior statement is presently subject to cross-examination. The adversary and the jury, therefore, would not have to rely solely upon an extrinsic witness who could report the present witness’ declaration; they would have both witnesses before them and could choose to believe either or neither of them.

Rule 503(b) of the Model Code of Evidence was adopted by the National Conference of Commissioners on Uniform State Laws when they proposed rule 63(1) of the Uniform Rules of Evidence.
In their comment, the Commissioners stated that their reason for the adoption was that after "sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay."\(^2\)

**Necessity for an Oath**

The majority emphasizes the requirement of oath because the oath serves a two-fold purpose.\(^9\) One purpose is to insure that any statement made by the declarant is made with proper circumspection; the other purpose is to impress upon the declarant that he may possibly subject himself to the penalty of perjury. These two traditional safeguards of the oath are not valid reasons for prohibiting the use of a prior inconsistent statement of a presently testifying witness as substantive evidence. Whatever religious or ceremonial significance that the oath might have had at one time, it is doubtful that the oath maintains so significant an impact in modern times.\(^3\) Of all the recognized exceptions to the hearsay rule, only the exception as to former testimony requires that the hearsay statement must have been given when the declarant was under oath.\(^2\) Although the witness was not under oath when he gave the prior inconsistent statement, he is presently under oath and, therefore, has a present duty to furnish the complete truth.\(^2\) Finally, situations of witnesses making prior statements that were intentionally false would occur in the minority of cases so that the "disadvantages of admitting a few more such statements would be outweighed by the advantage of admitting valuable evidence which is presently excluded."\(^3\)

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28. Comment, Uniform Rule of Evidence 63(1).
29. 4 J. Weinstein & D. Berger, Weinstein's Evidence § 800(01), at 800-10 (1975); C. McCormick, Evidence § 245, at 582 (2d ed. 1972); 1973 Hearings, supra note 7, at 128 (Supp.) (position paper of the Association of Trial Lawyers of America).
31. 1974 Hearings, supra note 8, at 65 (statement submitted by the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States); McCormick, supra note 1, at 576; see Fed. R. Evid. 804(b)(1).
32. 1973 Hearings, supra note 7, at 295 (Supp.) (letter from Judge Albert B. Maris, Chairman, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States).
The Demeanor of the Witness

The majority position has emphasized that as to a prior inconsistent statement, the critical observable event is the demeanor of the witness at the exact time that he made the prior inconsistent statement. However, in the words of Dean Wigmore, demeanor is nothing more than a "secondary and dispensable element." Indeed, it is difficult to dispute Judge Hand's often quoted remark in *DiCarlo v. United States* that when the triers of fact decide that the truth is not that to which the witness is presently testifying, but rather that which he said at a previous time, they are still making the decision based on what they see and hear in court.

The Opportunity for Cross-Examination

The most analytically troublesome position of the majority to contest is that a witness' prior inconsistent statement should not be given substantive effect because that statement was made at a time when its declarant was not subject to immediate cross-examination. In *California v. Green* the Supreme Court refused to accept the California Supreme Court's opinion that a subsequent cross-examination could never serve as a "constitutionally adequate substitute" for contemporaneous cross-examination.

In order to fully understand the significance of cross-examining a witness who has made a prior inconsistent statement, two key problems surrounding the situation of prior inconsistent statements must be explored: What is an inconsistent statement? When is a presently testifying witness subject to cross-examination?

35. 5 J. WIGMORE, EVIDENCE § 1399 (3d ed. 1940).
36. 6 F.2d 364, 368 (2d Cir.), cert. denied, 268 U.S. 706 (1925).
38. 399 U.S. 149 (1970), rev'g 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 792 (1969). For an interesting case that rejected the argument that a witness' prior inconsistent statements are constitutionally required, see People v. Gant, 58 Ill. 2d 178, 317 N.E.2d 564 (1974).
39. 399 U.S. at 158-159. It is also noteworthy that the Court emphasized that the confrontation clause was not exactly the same concept as the evidentiary rule against hearsay. *Id.* at 155. For an overview of the various theories of cross-examination as they relate to the constitutional requirements of confrontation and due process see Natali, Green, Dutton, & Chambers, *Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43 (1975); Baker, *supra* note 26, at 529-40; Graham, *supra* note 34, at 117; Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971).
Before a trial court is willing to admit a prior inconsistent statement for either impeachment or as substantive evidence, the court must determine whether the prior statement is inconsistent. Generally, inconsistency is determined by the whole impression or effect of what has been said or done. Thus, the inconsistency can be any material variance between the present testimony and the previous statement. The type of inconsistency can be two contradictory statements, two contrary statements, or an inconsistent position. Inconsistent positions may take the following forms: a witness testifies to a specific factual situation and impeachment is predicated upon a prior inconsistent opinion; a witness omits a fact that naturally would have been included; such omission, amounting to

41. 3A J. WIGMORE, EVIDENCE § 1040 (Chadbourn rev. 1970).
42. Morgan v. Washington Trust Company, 105 R.I. 13, 249 A.2d 48, 54 (1969); Commonwealth v. West, 312 Mass. 438, 45 N.E.2d 260, 262 (1942); C. MCCORMICK, EVIDENCE § 34, at 68 (2d ed. 1972); see Subecz v. Curtis, 483 F.2d 263, 266-67 (1st Cir. 1973) (need to show inconsistency was greater where a party was examining her own witness; fear was that the jury would use the inconsistent statement substantively).
43. A contradiction, as defined in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1950), is a proposition so related to a second proposition that it is impossible for both to be true or both to be false. Thus, if one proposition is true, then the other proposition has to be false. Some cases, indicated by the entire record, have produced contradictory statements by a witness. E.g., Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). For example, assume that the issue is whether the man or woman in the vehicle drove the vehicle. The only evidence as to that issue is a witness who has given two different accounts. Out of court, the witness has said that the man drove; whereas, in court, the witness said that the woman drove. Finally, assume that the civil plaintiff, who must prove that the man drove, calls the witness to the stand. Notwithstanding any contentions about the law concerning burdens of proof, a court which allows the out of court statement in the example only for its impeaching value (thereby causing the plaintiff's case to fail even though the jury could have accepted the truth of the out of court statement) must also face the charge that it is permitting a logical absurdity. See note 86 infra.
44. Contrary propositions, as defined in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1950), are propositions so related that although both can not be true, both can be false. Suppose a witness has testified in court that X did the event in question, but has also made an out of court statement that X did not do the event. Suppose further that the record also shows the possibility that Y might have done the event. Although a jury in this situation is logically free to reject both versions of the witness' account of the event, most likely the jury will believe one of the witness' versions to be true. Therefore, the jury's belief is the crucial factor. If it believes one of the contrary statements to be true, it must also believe that the other statement is false. See text accompanying note 84 infra.
45. 3 J. WEINSTEIN & D. BERGER, WEINSTEIN'S EVIDENCE ¶ 607[06], at 607-63-66 (1975). It should also be noted that rule 801(d)(1)(A) states in part: "[A]nd the statement is (A) inconsistent with his testimony... Fed. R. Evid. 801(d)(1)(A) (emphasis added).
an assertion of the non-existence of that fact, is used to impeach the
testimony of the witness who has previously asserted the fact's exist-
ence;\textsuperscript{47} inconsistency implied by silence;\textsuperscript{48} and a denial of recollec-
tion.\textsuperscript{49}

In cases where a court is willing to admit a prior inconsistent
statement as substantive evidence, not only must there be an incon-
sistency, but also there must be a witness who is presently subject
to cross-examination concerning his prior inconsistent
statement.\textsuperscript{50} If the situation is such that the witness, while on the stand, admits
that his prior inconsistent statement is true, there is no problem
because the triers of fact have two conflicting statements of equal
force to weigh as evidence.\textsuperscript{51} Accordingly, where the witness has
admitted the truth of his prior inconsistent statement, the courts
have usually granted substantive effect to that statement.\textsuperscript{52} More
perplexing, however, are the following situations: where the witness
has affirmed the prior statement but has either denied the underly-
ing fact or has claimed a lack of recollection as to that underlying

\begin{itemize}
\item \textsuperscript{47} People v. Bornholdt, 33 N.Y.2d 75, 350 N.Y.S.2d 369, 379-80 (1973); State v. Provet,
133 N.., Super. 432, 337 A.2d 374 (1975); People v. Burchette, 4 Ill. App. 3d 734, 281 N.E.2d
775, 777 (1972).

\item \textsuperscript{48} 3A J. Wigmore, Evidence § 1043 (Chadbourn rev. 1970). \textit{But see} Doyle v. Ohio, 96 S.

\item \textsuperscript{49} Ct. 2240 (1976); United States v. Hale, 422 U.S. 171 (1975). In \textit{Hale}, the Court, exercising
its supervisory authority over lower federal courts, held that, under the circumstances of the
case, the witness's silence was not so clearly inconsistent with his trial testimony as to have
warranted admission into evidence that silence as a prior inconsistent statement. Further-
more, the Court held that because the witness's silence during police interrogation, especially
after the witness received his Miranda warnings to the right to remain silent, lacked signifi-
cant probative value, any reference to his silence carried with it an intolerably prejudicial
impact. In Doyle it was held unconstitutional to impeach a witness by silence after his
Miranda rights were exercised. \textit{See Comment, Doyle v. Ohio: Use of Defendant's Silence for

\item \textsuperscript{50} Allowed: United States v. Washabaugh, 442 F.2d 1127, 1130 (9th Cir. 1971); United

\item \textsuperscript{51} States v. Insana, 423 F.2d 1165, 1170 (2d Cir.), cert. denied, 400 U.S. 841 (1970) (also allowing the

\item \textsuperscript{52} prior inconsistent statement as substantive evidence); People v. Bush, 29 Ill. 2d 367, 194

\item \textsuperscript{53} N.E.2d 308, 312 (1963); IND. ANN. STAT. § 2-1727 (Burns 1946). \textit{See also} 3A J. Wigmore,
Credit Corp. 254 Iowa 1044, 120 N.W. 2d 476, 480 (1963). It should also be noted that a
witness' refusal to testify does not suffice for inconsistency. Mays v. State, 495 S.W.2d 833
804(a)(3).

\item \textsuperscript{54} California v. Green, 399 U.S. 149, 155 (1970); \textit{Fed. R. Evid.} 801(d)(1)(A). \textit{See generally}

\item \textsuperscript{55} Comment, Substantive Use of Witness' Prior Inconsistent Statement Does Not Violate the

\item \textsuperscript{56} 4 J. Weinstein & D. Berger, \textit{Weinstein's Evidence} ¶ 801(d)(1)(A)(02), at 801-77-78
(1975).

\item \textsuperscript{57} United States v. Carter, 417 F.2d 229, 230-31 (3rd Cir. 1969); Slade v. United States,
267 F.2d 834, 838-39 (5th Cir. 1959); Commonwealth v. Fiore, 364 Mass. 819, 308 N.E. 2d
\end{itemize}
fact,\textsuperscript{53} where the witness disavows the prior statement and has either denied the underlying fact or professes a lack of recollection as to that underlying fact;\textsuperscript{54} or where the witness denies all personal knowledge of the event.\textsuperscript{55} The crucial issue in each of the aforementioned contexts of prior inconsistent statements is whether the witness has been effectively subjected to cross-examination.

One may be led to believe that a witness cannot be effectively cross-examined when he has affirmed his statement, but has either denied the underlying fact or claimed a lack of recollection as to that underlying fact. The belief is especially attractive when either the prosecution or civil plaintiff is permitted to impeach his own witness and thereafter to introduce any prior inconsistent statements of that witness as substantive evidence.\textsuperscript{56} From the viewpoint of the defendant, however, the situation is far from being hopeless.\textsuperscript{57} The witness can be effectively examined. First, where the witness admits the statement but denies the underlying fact, the defendant can elicit from the prosecutorial or civil plaintiff's witness the reason why he made the statement. Any number of causes could have prompted the witness to make the statement. The statement could have been a result of faulty perception or undue haste in explaining the event.\textsuperscript{58} The witness may have been intimidated into giving the
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statement.\(^{59}\) Also, there are the possibilities that vindictiveness, interest, or prejudice may have caused the witness to make the statement.\(^{60}\) In addition, the witness can be generally examined as to matters of perception, memory, narration, sincerity, and integrity.\(^{61}\)

When, however, the witness has admitted the prior statement, but has professed a lack of recollection as to the underlying event, a slightly different course of action must be pursued by the examiner. In California v. Green,\(^ {62}\) the witness did admit having made a prior statement but professed a lack of recollection as to the underlying event. The Court, after deciding that the confrontation clause of the sixth amendment was not violated by admitting the prior statement, remanded the case to the California Supreme Court to decide whether the witness' lapse of memory so affected the defendant's right to cross-examine as to make a critical difference in the application of the constitutional right to confrontation.\(^ {63}\) On remand, the California Supreme Court decided that the witness was properly subjected to cross-examination because the inconsistency could have been explained despite the defense's failure to have elicited any such explanation.\(^ {64}\) The court said that the trial court could have chosen to disbelieve the witness' claim of lack of recollection. The trial court could have considered such factors as the reasons for the lack of recollection, the time duration between the event and the testimony, and the likelihood of the witness' forgetting the particular fact.\(^ {65}\) In the situation where the witness admits the prior statement but asserts a lack of recollection of the underlying event, the examiner, although denied the opportunity to examine the witness as to that underlying event, may still conduct a general cross-


\(^{60}\) See, e.g., People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).


\(^{63}\) Id. The Court, in Green, left open the issue whether the substantive admission of a prior statement made by a presently testifying witness who alleges no recollection of having made the statement or the statement's underlying fact violates the defendant's sixth amendment right to confrontation. Judge Weinstein is of the opinion that it would probably violate the defendant's constitutional right to confrontation to substantively admit the presently testifying witness' prior statement when the witness alleges a complete lack of recollection. 4 J. Weinstein & D. Berger, Weinstein's Evidence \(\S\) 801(d)(1)(A)[07], at 801-97 (1975). The Fourth Circuit, however, has held to the contrary. See text accompanying notes 67-74 infra.

\(^{64}\) People v. Green, 3 Cal. 3d 98, 479 P.2d 998, 92 Cal. Rptr. 494 (1971).

\(^{65}\) Id. at 1002; 4 J. Weinstein & D. Berger, Weinstein's Evidence \(\S\) 801 (d)(1)(A)[04], at 801-83 (1975).
examination of the witness.66

The most difficult situation in which to assess whether a witness has been properly subjected to cross-examination is one in which the witness has disavowed his prior statement, and has either denied the underlying fact or declared a lack of recollection as to that underlying fact. Some commentators have expressed the opinion that in such a situation, "cross-examination does not hold much promise as a satisfactory testing procedure." Nevertheless, the California Supreme Court in People v. Romo,68 and the Fourth Circuit in United States v. Payne,69 have disagreed with those commentators. In Romo, after claiming no recollection as to the underlying event because of his intoxication at the time of the event, the witness also professed no recollection of having made a prior statement to a police officer.70 The police officer, who took a tape recorded statement from the witness, appeared in court and played the recording. The trial court held that the statement was properly admitted for impeachment and instructed the jury accordingly. On appeal, the Supreme Court of California said that the prior inconsistent statement of the witness could have been admitted as substantive evidence as well as for impeachment.71 In Payne, the Fourth Circuit held admissible as substantive evidence a prior inconsistent statement in the face of both a constitutional and an evidentiary attack, even when it determined that the witness was not feigning a loss of memory.72 In this situation, as in the situation when the witness admits having made the statement but professes a lack of recollection as to the underlying event, the witness is still subject to a general cross-examination.73 Furthermore, the person to whom the disavowed statement was made can be generally cross-examined and, quite possibly, can be cross-examined as to the underlying event.74

68. 14 Cal. 3d 189, 534 P.2d 1015, 121 Cal. Rptr. 111 (1975).
70. 534 P.2d at 1018.
71. Id. at 1019.
72. 492 F.2d at 450-51.
73. See note 61 supra.
74. 4 J. WEINSTEIN & D. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(1)(A)(06), at 801-88-89 (1975). See also Fed. R. Evid. 613(b). Judge Weinstein has expressed the opinion that where the witness has professed a lack of recollection as to both having made the prior statement and its underlying fact, the statement will probably be excluded unless it can qualify as a former testimony (Fed. R. Evid. 804(a)(3),(b)(1)) or some other exception to the hearsay rule.
Prior Inconsistent Statements

BENEFITS OF ADMITTING PRIOR INCONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE

The liberal Supreme Court version of rule 801(d)(1)(A) would have had a beneficial impact on the search for truth. Some specific benefits would be the assurance of trustworthiness, the protection against the recreant witness, and the elimination of confusing jury instructions.

When jurisdictions allow exceptions to the hearsay rule, those exceptions have usually been permitted on the premise that the proffered evidence has satisfied both a guarantee of trustworthiness and a requirement of necessity. In the case of a witness’ prior inconsistent statement, where the whole purpose of the hearsay rule has already been satisfied, the additional guarantees of trustworthiness and necessity further mandate that such statements be given substantive effect. In the opinion of Dean McCormick, the prior inconsistent statements of a witness are not merely trustworthy, but are actually superior in trustworthiness to any testimony given by the witness in court. The basis of Dean McCormick’s opinion is the valid assumption that “memory hinges upon recency.” Moreover, the ability to use the prior inconsistent statement as substantive evidence will protect a party against those witnesses who have turned against him because they have been wrongly influenced or have had improper pressures placed upon them. The ability to protect oneself against the turncoat witness who has been bribed or intimidated, by using that witness’ prior

(e.g., Fed. R. Evid. 803(1), (2), (5), (24), 804(b)(5)). 4 J. Weinstein & D. Berger, Weinstein’s Evidence ¶ 801(d)(1)(A)06, at 801-97 (1975). With due deference to Judge Weinstein, it must be noted that two federal circuits (albeit prior to the effective date of the Federal Rules of Evidence) have used rules 801(d)(1)(A) and 804(a)(3), (b)(1) interchangeably. United States v. Collins, 478 F.2d 837, rehearing denied en banc, 480 F.2d 925 (5th Cir.), cert. denied, 414 U.S. 1010 (1973); McDonnell v. United States, 472 F.2d 1153 (8th Cir. 1973). Therefore, rather than being mutually exclusive, rules 801(d)(1)(A) and 804(a)(3), (b)(1) are probably overlapping. See also People v. Romo, 14 Cal. 3d 189, 534 P.2d 1015, 121 Cal. Rptr. 111 (1975); United States v. Payne, 492 F.2d 449 (4th Cir.), cert. denied, 419 U.S. 876 (1974); text accompanying note 122 infra.

76. 399 U.S. at 155; 3A J. Wigmore Evidence § 1018 (Chadbourn rev. 1970).
77. McCormick, supra note 1, at 577.
78. Id. at 577-78 n.12-14; see Beaver & Biggs, supra note 33, at 334; Stewart, Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 Utah L. Rev. 1, 8-22; Extrajudicial Statements, supra note 61, at 126.
79. McCormick, supra note 1, at 577. Extrajudicial Statements, supra note 61, at 120; 1974 Hearings, supra note 8, at 51 (testimony of Professor Edward W. Cleary, reporter to the Advisory Committee on Rules of Evidence, Judicial Conference of the United States). This assumption also presumes that a party may impeach his or her own witness. See text accompanying notes 109-121 infra.
inconsistent statements as substantive evidence is buttressed, therefore, not only by the safeguard of trustworthiness, but also by the safeguard of necessity.80

The majority's orthodox position, which does not allow the prior inconsistent statement of a witness to be used substantively, does not allow the prior inconsistent statement to be used to impeach the credibility of the witness.81 When a party seeks to use a prior inconsistent statement to impeach a witness' credibility, the opposing party is entitled to a jury instruction limiting the prior inconsistent statement to its use as impeachment.82 Many eminent scholars and judges have expressed a general dislike for the practice of instructing a jury to consider evidence for its limited use.83 The use of a limiting instruction reaches the pinnacle of exasperation when the jury is told to consider a witness' prior inconsistent statement for only its impeachment value. As Dean Ladd once said:

Indeed, as a practical matter it is hard to conceive of the situation in which a jury would draw such fine lines as to say, "we regard the statement made out of court as a true statement and therefore will disregard the contradictory testimony given in court, but we will not consider the statement made out of court as evidence upon which we will base our verdict although we believe it to be true." If the jury considers the statement in court false and the extra-judicial statement true, it is expecting a good deal of jurors not experienced in such fine distinctions simply to reject all of the evidence.84

Consequently, Dean Ladd's principle requiring that a prior inconsistent statement, if used at all, be used for all purposes represents the soundest position.85

80. Contra, Reutlinger, supra note 30, at 366. Professor Reutlinger is of the opinion that the examiner's use of a prior inconsistent statement as substantive evidence is not a necessity but merely a desirability.
81. See note 20 supra.
84. S. LADD & R. CARLSON, CASES AND MATERIALS ON EVIDENCE 820 (1972).
85. Ladd, supra note 46, at 250. A limiting instruction to consider the prior inconsistent statement only for impeachment is all the more absurd when one also considers the so-called
POTENTIAL PROBLEMS OF ADMITTING PRIOR INCONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE

The principle that a witness’ prior inconsistent statement is admissible only for impeachment becomes especially significant where the party charged with the burden of producing evidence relies upon the inconsistent statement as the only material evidence in support of his case. The jurisdictions following the impeachment only rule have held that when the only evidence produced by the party charged with the burden of producing evidence is a witness’ prior inconsistent statement, the party’s case fails. Many have feared that a change in position allowing the prior inconsistent statement to be given substantive effect would probably also require that a prior inconsistent statement be sufficient to sustain a party’s case. To say that a prior inconsistent statement alone would in all instances be enough to sustain a party’s case is a gross overstatement. This is not an issue that is reductive to a hard and fast rule, but one that should depend upon the circumstances of each case. Admissibility of evidence should never be pred-

“collateral rule.” The “collateral rule,” as it relates to prior inconsistent statements, excludes a party from introducing extrinsic evidence of the witness’ prior inconsistent statement unless that statement is relevant to a material, consequential issue of the case. Ewing v. United States, 135 F.2d 633 (D.C. Cir. 1942), cert. denied, 318 U.S. 776 (1943); 3 J. WEINSTEIN & D. BERGER, WEINSTEIN’S EVIDENCE ¶ 607(06), at 607-69-70 (1975); C. McCORMICK, EVIDENCE §§ 36, 47 (2d ed. 1972); see United States v. Barash, 365 F.2d 395, 401 (2d Cir. 1966) (allowing impeachment by prior inconsistent statement but not extrinsic evidence as to a collateral matter). Therefore, the very essence of the collateral rule is that the extrinsic evidence be worthy of substantive effect even though the limiting instruction mandates that it not be given such effect.

86. United States v. Tavares, 512 F.2d 872 (9th Cir. 1975); United States v. Neal, 452 F.2d 1085 (10th Cir. 1971); Lerma v. United States, 387 F.2d 187 (8th Cir.), cert. denied, 391 U.S. 907 (1968).


88. 1974 Hearings, supra note 8, at 36 (testimony of Judge Charles W. Joiner, Member, Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States).

89. 1973 Hearings, supra note 7, at 98-99 (Supp.) (letter from Professor Edward W. Cleary, Reporter, Advisory Committee on Rules of Evidence, Judicial Conference of the United States); 32A C.J.S. EVIDENCE § 1042, at 802 (1964). It should be noted that a general discussion of distinctions between the standard of persuasion in a civil case (i.e., “preponderance of the evidence”; “clear and convincing”) and the standard of persuasion in
icated upon its ability to sustain a case. If every item of evidence were required to be sufficient to sustain a case before it could be admitted, few items would ever be admitted. A witness' prior inconsistent statement, if admitted as substantive evidence, would in many cases be direct evidence. Unlike the system of Roman law, which attached numerical values to witnesses, the Anglo-American system has avoided mathematical concepts as to the sufficiency of evidence. Even as to a criminal case, therefore, the general rule is that the direct testimony of a single witness is sufficient to support a verdict.

The enigma of the single, direct, prior inconsistent statement, however, can be solved by a requirement of corroboration. But rather than requiring corroboration as a prerequisite to admissibility, prior inconsistent statements should be admitted in every case. Corroboration, then, should be a determining factor considered by

a criminal case (i.e., "beyond a reasonable doubt") is beyond the scope of this article. See generally C. McCormick, Evidence §§ 338, 339, 340, 341 (2d ed. 1972). Whether the federal courts will make distinctions in standards of persuasion when they deal with prior inconsistent statements is a matter of pure speculation at this time. As to whether there should be different standards of evidence in criminal and civil trials, see Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932, 950-51 (1962); 5 J. Wigmore, Evidence ¶ 131 (3d ed. 1940).

90. See, e.g., Fed. R. Evid. 804(b)(3) which states in part:

A statement tending to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Although the requirement of corroboration in rule 804(b)(3) is a precondition to the admissibility of evidence under the rule [see P. Rothstein, Understanding the New Federal Rules of Evidence 131 (1973)], it is also a fair assumption that the requirement of corroboration was included to make any such statement admitted sufficient, when standing alone, to support a verdict.


93. 7 J. Wigmore, Evidence § 2032 (3d ed. 1940); H. JoLowicz, Historical Introduction to the Study of Roman Law 462 (1954); Graham, supra note 34, at 128.


95. United States v. Jones, 486 F.2d 476, 479 (8th Cir. 1973); United States v. Terry, 362 F.2d 914, 916 (6th Cir. 1966); Proffit v. United States, 316 F.2d 705, 707 (9th Cir. 1963); Carter v. People, 175 Colo. 497, 488 P.2d 558 (1971); State v. Newcomb, 146 Me. 173, 78 A.2d 787, 789 (1951). However, the testimony of a single witness is not sufficient to support a verdict when such testimony is contradictory to known physical facts. Ford Motor Company v. Arguello, 382 P.2d 886, 890 (Wyo. 1963). But mere contradictions by other witnesses are not enough to upset the sufficiency of testimony supplied by a single witness. Geter v. State 219 Ga. 125, 132 S.E.2d 30, 36 (1963). But see Letner v. State, 512 S.W.2d 643, 649 (Tenn. Crim. App. 1974) (one witness' testimony not sufficient if it is "not of a cogent and conclusive nature, and if it is so indefinite, contradictory or unreliable that it would be unsafe to rest a conviction thereon").
the trial court when passing upon the sufficiency of that single, direct, prior inconsistent statement to withstand a motion for a directed verdict, a judgment notwithstanding the verdict, or a judgment of acquittal.\footnote{96}

The requirement of corroboration is familiar to many facets of American law. It has been required in regard to certain statements to insure sufficiency to support a conviction.\footnote{97} In addition, judges, in certain situations, instruct the jury to accept any uncorroborated evidence with caution.\footnote{98} Therefore, a trial court in a directed verdict situation, or an appellate court on review, could determine whether a prior inconsistent statement were properly corroborated either as to its having been made or as to its surrounding circumstances.\footnote{99} Circumstantial evidence has been held to be sufficient to sustain a verdict, even in a criminal case;\footnote{100} therefore, a court could examine the record for any circumstantial or direct evidence presented in

\footnote{96. See \textit{Fed. R. Civ. P. 50}; \textit{Fed. R. Crim. P. 29}; C. WRIGHT, \textit{Law of Federal Courts} \S 95 (2d ed. 1970). It should also be noted that the Study Committee on the Federal Rules of Evidence for the District of Columbia Bar proposed that the following sentence be added to the Advisory Committee's note to rule 801(d)(1): "For purposes of a ruling on the sufficiency of the evidence to support a criminal or civil issue on motion for directed verdict, N.O.V. or for judgment of acquittal, prior statements admissible under Rule 801(d)(1) should be treated in the same manner as any other form of evidence." 1973 \textit{Hearings, supra} note 7, at 287 (Supp.) (letter from Joseph S. McCarthy, Chairman, Study Committee on Federal Rules of Evidence of the District of Columbia Bar).

\footnote{97. \textit{Wong Sun} v. United States, 371 U.S. 471, 488-89 (1963) (confession must be corroborated by prima facie evidence of the corpus delicti); \textit{United States} v. Gross, 511 F.2d 910, 915 (3rd Cir. 1975) (as to prosecution under the general perjury statute, \textit{18 U.S.C.} \S 1621 (1970), the uncorroborated oath of one witness is not enough to establish the falsity of the accused's testimony); \textit{United States} v. McConney, 329 F.2d 467 (2d Cir. 1964) (false exculpatory statements not sufficient to sustain a conviction under the Mann Act); \textit{State} v. Kasai, 27 Utah 2d 326, 495 P.2d 1265, 1266 (1972) (testimony of an accomplice must be corroborated).


\footnote{99. See, e.g., \textit{Chambers} v. \textit{Mississippi}, 410 U.S. 284, 300 (1973), where the Court stated: The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case—McDonald's sworn confession, the testimony of an eye-witness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. . . .

\footnote{100. \textit{Holland} v. United States, 348 U.S. 121, \textit{rehearing denied}, 348 U.S. 932 (1954); \textit{United States} v. \textit{Downen}, 496 F.2d 314, 318-19 (10th Cir.), \textit{cert. denied}, 419 U.S. 897 (1974); \textit{United States} v. \textit{Burrell}, 496 F.2d 609 (3rd Cir. 1974). It should be noted that if the prior inconsistent statement is circumstantial rather than direct, the statement would have to meet the existing sufficiency standard as to circumstantial evidence.}
support of the prior inconsistent statement to sustain the verdict.\textsuperscript{101} Moreover, a court should take into consideration the situation where the prior inconsistent statement has been admitted when the party charged with the burden of producing evidence has satisfied that burden and has offered the statement into evidence by way of impeaching his opponent's witness.\textsuperscript{102} There is no problem with insufficient corroboration because the party charged with the burdens of proof has already made his case.\textsuperscript{103}

In determining whether or not a prior statement has been made, a court could consider certain factors about the statement itself. Because the strength of the statement would be derived from the statement itself rather than from evidence supplementing the statement, the consideration of these factors would not be classical corroboration. However, this judicial method would be superior to the existing procedure of the Federal Rules of Evidence in its rule 801(d)(1)(A) which admits the statement by means of an inflexible rule that supposedly assures reliability. A court could consider such factors as whether the prior inconsistent statement was given under oath at some kind of formal proceeding\textsuperscript{104} or whether the statement was written, signed, recorded, or acknowledged by the witness. When the statement is oral, unsworn, and the witness either denies making the statement or has no recollection of making the statement, the court could consider the following factors: whether the statement was given by more than one witness;\textsuperscript{105} or whether a witness gave a statement to more than one person or to one person more than once.\textsuperscript{106} As stated by the Advisory Committee to the Judicial

\begin{footnotes}
\item[101] United States v. Lipscomb, 425 F.2d 226, 227 (6th Cir. 1970); see Dutton v. Evans, 400 U.S. 74, 87 (1970); United States v. Pacelli, 470 F.2d 67, 69-70 (2d Cir. 1972, cert. denied, 410 U.S. 983 (1973); FR. R. CRIM. P. 52(a). A contention might be raised that no reform need be made because this result is already accomplished when the jury disregards the limiting instruction to use the prior inconsistent statement for only impeachment. However, the contention is not valid because the integrity of the judicial system is at stake. 1973 Hearings, supra note 7, at 195 (Supp.) (letter from Alan B. Morrison, Public Citizen, Inc.).
\item[103] 481 F.2d 929, 932 (5th Cir.), cert. denied, 414 U.S. 1115 (1973). Furthermore, the general rule is that after any motion for a directed verdict, the court must consider all the evidence including any of the defendant's evidence that bolsters the government's case. United States v. Grizaffi, 471 F.2d 69, 73 (7th Cir. 1972); United States v. Haskell, 327 F.2d 281, 282 n.2 (2nd Cir. 1964).
\item[104] See, e.g., United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976); FED. R. EVID. 801(d)(1)(A).
\item[106] See, e.g., United States v. Rainwater, 283 F.2d 386 (8th Cir. 1960).
\end{footnotes}
Conference, "When the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without."107

**INTERDEPENDENCE OF RULE 801(d)(1)(A) AND RULE 607**

Rule 801(d)(1)(A) must operate in tandem with rule 607, which allows a party to impeach his own witness.108 An analysis of the relationship between the two rules lends further credence to the proposition that Congress took a compromising step backward when enacting rule 801(d)(1)(A) in its present form.

Traditionally, three reasons have been noted in justification of the rule against impeaching one's own witness.109 First, it has been argued that a party, by calling a witness, is morally bound by his testimony.110 Second, a party calling a witness vouches for the credibility of that witness.111 Third, the rule against impeaching one's own witness provides protection against a party's coercing a witness into testifying as desired.112

As in the case in other areas of the law where the harshness of a general rule fosters a series of exceptions to that rule, the rule against impeaching one's own witness has been avoided by exceptions. For example, a party has been free to introduce other evidence

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110. However, a party has always been able to introduce other evidence contradicting the facts testified to by his witness. C. McCormick, Evidence § 38, at 75 n.67 (2d ed. 1972).

111. The "voucher rule" has fallen upon hard times in recent years. The Supreme Court, in Chambers v. Mississippi, 410 U.S. 284, 296, 302 (1973), although not holding the "voucher rule" to be constitutionally inadequate in every case, did express a general dislike for the rule. See also Maness v. Wainwright, 512 F.2d 88, 91-92 (5th Cir. 1975) (holding that Chambers did not declare that a state's use of the "voucher rule" was constitutionally impermissible). Furthermore, with the possible exceptions of expert witnesses or those witnesses whom a party is required by law to call, it cannot be said that a party has a free choice in calling witnesses. C. McCormick, Evidence § 38, at 75 (2d ed. 1972).

112. The theory, however, applies more to an attack upon a witness' character than it does to an impeachment by prior inconsistent statement. Furthermore, it should be noted that it is tactically unwise to launch an attack on the character of a witness whom a party calls. Comment, Witnesses Under Article VI of the Proposed Federal Rules of Evidence, 15 Wayne L. Rev. 1236, 1264 (1969). But see United States v. Rothman, 463 F.2d 488, 490 (2d Cir.), cert. denied, 409 U.S. 956 (1972) (allowing the government, on its direct exam, to elicit information that was damaging to the witness' character on the ground that it prevented "the defense from creating a misleading impression, or the jurors from thinking that the Government is seeking to keep something from the jury").
contradicting the facts to which his witness has testified. A party has been able to refresh the recollection of a witness who has failed to remember certain facts or made contrary or contradictory statements. On occasion, the trial court has, itself, called a witness when neither party was willing to vouch for that witness' veracity. Where a party is faced with a hostile witness or calls an adverse party to the witness stand, many jurisdictions have relaxed the rule. In almost all of the federal circuits, prior to the enactment of rule 607, impeachment of a party's witness by a prior inconsistent statement was allowed when the dual requirements of surprise and affirmative damage were met. Affirmative damage was defined as something more than a mere failure to give helpful evidence to the impeaching party. Responses by the witness such as "I don't know," "I am not sure," or "I don't remember" did not constitute affirmative damage. The affirmative damage rule protected a party against his opponent's placing before the jury, under the guise of impeachment, evidence to which the jury would have improperly given substantive effect. However, when damage occurred, there was a definite need for the impeaching party to have "neutralized" the harmful testimony.

The extreme closeness of the relationship between rule 607 and rule 801(d)(1)(A) can be effectively demonstrated by the use of a

113. See note supra.
115. United States v. Wilson, 361 F.2d 134 (7th Cir. 1966); United States v. Lutwak, 195 F.2d 748, 754-55 (7th Cir. 1952).
116. For cases and statutes see Slough, supra note 109, at 7-8. See also former Fed. R. Civ. P. 43 (b).
118. United States v. Dunmore, 446 F.2d 1214, 1220-1221 (8th Cir. 1971), cert. denied, 404 U.S. 1041 (1972); United States v. Johnson, 427 F.2d 957, 960-961 (5th Cir. 1970); C. McCormick, Evidence § 38, at 76 (2d ed. 1972); Slough, supra note 109, at 11-12.
119. 3A J. Wigmore, Evidence § 904(8) (Chadbourn rev. 1970); Slough, supra note 109, at 11 (1958). However, once the court has determined that a party has shown damage, and, thereafter, allows that party not only to impeach the witness by a prior inconsistent statement, but also to introduce extrinsic evidence as to the statement, the jury will more than likely give the prior inconsistent statement substantive effect notwithstanding any limiting instruction to the contrary. See note 84 supra.
120. Slough, supra note 109, at 11; see, e.g., State v. Pope, 215 S.E.2d 139 (N.C. 1975); Patterson v. State, 342 A. 2d 660 (Md. 1975) (to show why the witness was called).
helpful hypothetical example. Assume that a party offers a witness who takes the stand and declares that he cannot remember making an unsworn statement to a police officer. The party offers a second witness who testifies to events that are identical to the events in the first witness' unsworn statement. The court, in the hypothetical situation, is faced with a dilemma. It could allow the first witness' unsworn statement for only impeachment, in which case the jury would be totally confused because of the substantive evidence that would be introduced through the second witness. In the alternative, the court could refuse to allow the first witness to be impeached, thereby clearly rejecting the congressional intent of rule 607 to eliminate all obstacles in the way of a party who wanted to impeach his own witness.  

When Congress amended the Senate/Supreme Court version of rule 801(d)(1)(A), it failed to fully analyze the operational relationship between rules 607 and 801(d)(1)(A). The confusion resulting from the incongruity of the two rules was blatant in United States v. Jordano. Nancy Willis, a government witness, testified as to Jordano's alibi. The government then introduced her inconsistent grand jury testimony and several inconsistent statements that she had given to the police. At trial, the grand jury testimony was admitted substantively, while the statements given to the police were admitted only for impeachment purposes. The Second Circuit upheld the trial court's decision. A jury is seriously confused when it is instructed to limit a prior inconsistent statement to impeachment; it is irreparably confused when instructed, especially in regard to the same issue, to use one prior inconsistent statement for its substantive effect, but to use several other prior inconsistent statements only for their impeaching effect.  

**INTERNAL INCONSISTENCY: RULE 801(d)(1)**  

Internal inconsistency in rule 801(d)(1) also fosters confusion. Rule 801(d)(1)(B) allowy, as substantive evidence, any statement  

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122. P. Rothstein, Understanding the New Federal Rules of Evidence 53 (1973); Advi-  
121. See text accompanying notes 126-127 infra.  
123. 521 F.2d 695 (2nd Cir. 1975). See also United States v. Cunningham, 446 F.2d 194 (2d Cir), cert. denied, 404 U.S. 950 (1971); United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970).  
124. 521 F.2d at 697.  
125. Id. at 697-98. See also Fed. R. Evid. 613; Conf. Rep. No. 93-1597, 93d Cong., 2d Sess.  
10 (1974).  
126. See text accompanying notes 82-85 supra.  
consistent with the witness' testimony if that consistent statement is offered to rebut an express or implied charge of either recent fabrication, or improper influence or motive.\textsuperscript{128} Whereas rule 801(d)(1)(A) requires that prior inconsistent statements used substantively must have been given under oath at a former proceeding, rule 801(d)(1)(B) makes no such requirement as to the substantive use of prior consistent statements. Whether the different result in the two rules was a drafting oversight\textsuperscript{129} or a direct intention because rehabilitative consistent statements are considered less likely to be abused\textsuperscript{130} is irrelevant when considered in light of the problem created by the different admission requirements of the two rules. The jury will not be able to distinguish between giving substantive effect to prior rehabilitative consistent statements while giving only impeaching effect to unsworn prior inconsistent statements.\textsuperscript{131} The jury's task will be impossible when a witness, impeached by an unsworn prior inconsistent statement, is thereafter rehabilitated by a prior consistent statement.\textsuperscript{132}

On October 16, 1975, President Ford signed Senate Bill 1549\textsuperscript{133} which restored to the Federal Rules of Evidence former rule 801(d)(1)(C) of the Supreme Court's version of the rules. Rule 801(d)(1)(C) excludes from hearsay the out of court identification of a person if the identifying witness is in court subject to cross-examination.\textsuperscript{134} In the past, when a witness' prior identification passed constitutional muster,\textsuperscript{135} federal courts admitted the out of

\textsuperscript{128} FED. R. EVID. 801(d)(1)(B). It should be noted that rule 801(d)(1)(B), unlike Uniform Rule of Evidence 503(b) or the Model Code of Evidence Rule 63(1), allows the prior consistent statement only as support in certain situations. Rules 63(1) and 503(b), which have permitted all prior statements of a witness as substantive evidence, might have lead to abuse because many parties might have cluttered their cases with prior statements. But see FED. R. EVID. 403.

\textsuperscript{129} A drafting oversight seems unlikely because there was at least one proposal that would have required both prior inconsistent statements and prior rehabilitative statements to have been under oath at a former proceeding. 1973 Hearings, supra note 7, at 94-95 (Supp.) (letter from Herbert E. Hoffman, Counsel, Special Subcommittee on Reform of Federal Criminal Laws).

\textsuperscript{130} 4 J. WEINSTEIN & D. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(1)(B)(01), at 801-99; C. McCORMICK, EVIDENCE § 251, at 604 (2d ed. 1972); Reutlinger, supra note 30, at 366-67. Basically, the theory is that the opposing party, who has opened the door to the admission of the rehabilitative statements, should not complain because the rehabilitative statements are no different than that to which the witness presently testifies.

\textsuperscript{131} Blakey, supra note 87, at 626.


\textsuperscript{134} Id.

\textsuperscript{135} Kirby v. Illinois, 406 U.S. 682 (1972); Foster v. California, 394 U.S. 440 (1969); Simmons v. United States, 390 U.S. 377 (1968); United States v. Wade, 388 U.S. 218 (1967);
court identification as an exception to the hearsay rule. However, the most important factor in causing Congress to reinstate rule 801(d)(1)(C) was the reliability of prior identifications compared with in-court identifications. Congress placed great importance on the prior identification being fresher in the witness' memory. It was incongruous, therefore, for Congress to have reinstated rule 801(d)(1)(C) on the basis of the fresher memory rationale without also having reinstated the Supreme Court's version of rule 801(d)(1)(A). Moreover, any prior identifications admitted under rule 801(d)(1)(C) are not conditioned upon any requirement of impeachment or support, nor are the prior identifications required to have been given under oath at a former proceeding. Therefore, as in the situations involving rules 801(d)(1)(A) and (B), further problems of conflicting, confusing jury instructions will arise.

The requirements in rule 801(d)(1)(A) that the prior inconsistent statement be "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition," although arguably akin to corroboration because they provide an assurance of reliability, will no more insure that a single prior inconsistent statement is sufficient to sustain a verdict than a prior inconsistent statement not meeting those requirements. The general rule is that former testimony may be proved by the testimony of any person who was present and heard it given.

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138. This is especially so if one operates on the premise that human memory has diminished reliability with spoken words as opposed to physical events. Extrajudicial Statements, supra note 61, at 111. For an excellent discussion as to the relationship between prior identifications and prior statements, see Beaver & Biggs, supra note 33, at 329-338.

no difference, in terms of assuring reliability, whether the statement was proved by the testimony of a grand juror or by the testimony of a person who heard the statement given while on the street.\textsuperscript{140} Moreover, an unsworn prior inconsistent statement and a sworn prior inconsistent statement should stand on equal levels of reliability when the witness who gave the statement acknowledges having given that statement.\textsuperscript{141} Finally, one of the principal reasons why Congress initially rejected the Supreme Court's version of rule 801(d)(1)(C) was the fear that a person could be convicted solely upon evidence admitted under that rule.\textsuperscript{142} Congress flatly rejected that fear when it reinstated rule 801(d)(1)(C).\textsuperscript{143} Consequently, congressional reinstatement of rule 801(d)(1)(C) suggests that there is insufficient reason why it should not also adopt the Supreme Court's version of rule 801(d)(1)(A).

\textbf{CONCLUSION}

The congressional compromise in rule 801(d)(1)(A) not only created many problems that could have been avoided, but also destroyed the practical utility of rule 801(d)(1)(A) as promulgated by the Supreme Court.\textsuperscript{144} Congress, by restrictively amending rule 801(d)(1)(A), frustrated the intention of the proposed drafts of the Federal Rules of Evidence which would have liberalized the admission of hearsay in the federal courts. This congressional step back-

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\item\textsuperscript{140} In State v. Igoe, 206 N.W.2d 291 (N.D. 1973), the court held that a prior inconsistent statement of a witness given before the grand jury was properly admitted as substantive evidence at trial when the witness was unable to recollect the statement. Furthermore, the court indicated that the prior inconsistent statement, which was the only evidence in the prosecutor's case, would have been enough for a conviction were it not for the defense counsel relying upon the trial court's ruling that the statement would not be given substantive effect. The defense counsel's reliance upon the trial court's ruling caused him to advise his client not to take the stand because the prosecution had no other evidence of the defendant's guilt. Although the statement in Igoe was before the grand jury, the court did not limit its holding to only those statements made before the grand jury. Rather, the court held that substantive effect was to be given to all prior inconsistent statements of witnesses who presently testify under oath subject to cross-examination.
\item\textsuperscript{141} See text accompanying notes 104-105 supra.
\item\textsuperscript{142} S. Rep. No. 93-1277, 93d Cong., 2d Sess. 16 (1974). It is anomalous that the Senate used the sufficiency theory to strike Supreme Court rule 801(d)(1)(C), and, at the same time, used that same theory to sustain Supreme Court rule 801(d)(1)(A). S. Rep. No. 93-1277, 93d Cong., 2d Sess. 16 n.21 (1974).
\item\textsuperscript{143} S. Rep. No. 94-355, 94th Cong., 1st Sess. 3-4 (1975).
\item\textsuperscript{144} 1974 Hearings, supra note 8, at 51 (testimony of Professor Edward W. Cleary, Reporter to the Advisory Committee on Rules of Evidence, Judicial Conference of the United States); 1973 Hearings, supra note 7, at 294 (Supp.) (letter from Judge Albert B. Maris, Chairman, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States).
\end{itemize}
ward thwarted the attempt of the Supreme Court to eliminate evidentiary obstacles in the search for truth. 145

